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SOVEREIGNTY IN ENGLISH LAW.[1]

ACCORDING to modern law and practice there is no doubt that Parliament, or, to speak more technically, the Queen in Parliament, is sovereign in England, and no other person or body has the attributes of sovereignty. "The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."[2] That is to say, Parliament is the one authority capable of making, declaring, and amending the law of England without reference to any other authority and without any legal limit to its own power. Ever since there has been an English monarchy it has been understood that the King had powers of legislation, and that they ought not to be exercised without advice.[3] From the thirteenth century onwards it was understood, in particular, that new taxes could not be imposed without the consent of Parliament, but other points long remained vague. In later times it has been definitely settled that the only competent advice and consent for all legislative purposes are those of the Lords spiritual and temporal and Commons in Parliament assembled. Later still it has become an undisputed

[1] From a work in preparation, founded on lectures delivered at Oxford.

[2] Dicey on the Law of the Constitution, 4th ed., 1893, p. 136.

[3] "Leges namque Anglicanas licet non scriptas leges appellari non videtur absurdum . . . eas scilicet quas super dubiis in consilio definiendis, procerum quidem consilio et principis precedente auctoritate, constat esse promulgatas." — Glanvill, Prol.

proposition that no bounds can be assigned in point of law to the legislative power exercised with that authority.

The earliest definite statement of the modern doctrine appears to be Sir Thomas Smith's in his "Commonwealth of England," written, as the book itself states,[1] in 1565, and intended mainly for the use of Continental readers.[2] The book was, however, first published in 1583.

"The most high and absolute power of the Realm of England consisteth in the Parliament. . . . That which is done by this consent is called firm, stable, and *sanctum*, and is taken for law. The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to be followed, changeth right and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth form of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in blood and name, as the highest court condemneth or absolveth them whom the prince will put to trial. And to be short, all that ever the people of Rome might do either *Centuriatis Comitis* or *Tributis*, the same may be done by the Parliament of England, which representeth and hath the power of the whole Realm, both the head and body. For every Englishman is intended to be there present either in person or by procuration and attorney, of what pre-eminence, state, dignity, or quality soever he be, from the Prince (be he King or Queen) to the lowest person of England. And the consent of the Parliament is taken to be every man's consent."[3]

Here we have the first exposition by any English writer, if not by any European one, of the notion of sovereignty in its modern amplitude. Almost simultaneously Bodin, writing in France, defined "majestas" to the same effect, and argued, as Hobbes did afterwards, that in England sovereignty belonged to the King alone. It may well be supposed that Sir Thomas Smith, while he was employed as Ambassador to the French Court, had Bodin's work in some way communicated to him, although it was not actually published before 1577, in which year Smith died. Apparently Sir Thomas Smith was anxious both to make it clear to French-

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[1] *Ad fin.*

[2] Learned persons resorting to England seem to have used it as a kind of guide-book. See the Elzevir edition of the Latin text, 1641, furnished with an itinerary and other matter to the same purpose.

[3] T. Smith, Commonwealth of England, Book 2, ch. 2.

men that the King of England was not absolute, and to ascribe to Parliament at least as much authority as any Frenchman could ascribe to the King of France. It must be remembered that Sir Thomas Smith, who was the first Regius Professor of Civil Law at Cambridge, was not a common lawyer, but a civilian. He was familiar with the Roman adage *Quod principi placuit legis habet vigorem*, and was determined, it seems, to show his Continental colleagues in Roman learning that we had as good a sovereign as any of theirs. He saw the importance of the point as clearly as Hobbes did seventy years later, and, using his insight with greater political wisdom, boldly put, not the King alone, but the King in Parliament, in the place of the Roman Emperor. In this he was somewhat before his age. His view is amply justified by all modern constitutional writers. Blackstone expressly declares that the sovereignty of the British constitution is lodged in Parliament,[1] and that it is the place where that absolute despotic power which must in all governments reside somewhere is intrusted by the constitution of these kingdoms; after which he almost repeats Sir Thomas Smith's language.[2] But in Sir Thomas Smith's own time the sages of the Common Law would hardly have agreed with him. Their opinion seems to have been that not only the King was subject to the law, but the law was in some way above Parliament. Some fundamental principles of law and justice, never defined but generically described as "common right," were sacred against the legislature, and if Parliament were to transgress them it would be the right and the duty of the judges to pay no attention to such enactments.

Coke enounced this opinion with his usual vehemence, and even more than his usual inaccuracy or disingenuousness in reading his own particular opinion into the authorities on which he professed to rely.[3] He found, as will appear below, nominal fol-

[1] Comm. i. 51. [2] Ibid. 160, 161.

[3] Bonham's Case, 8 Rep. 118*a*: "It appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void; and therefore in 8 Ed. III. 30 . . . Herle saith some statutes *are made against law and right*, which those who made them perceiving, would not put them in execution." The italicized words are a mere gloss of Coke's own. What Herle did say, as reported, is, "Ils sont ascuns statutes faitz que celuy mesme qui les fist ne les voleit pas mettre en fait." Plenty of modern statutes have been inoperative in practice, not because the common law controlled them, but because they were in fact unworkable.

lowers down to the eighteenth century. Blackstone, however, while in one place he makes a nominal concession to the "law of nature," uses quite other language when he comes to the practical side of English institutions. He denies in particular what he has seemed to admit in general; he will hear nothing of any human authority being empowered to control the Parliament of Great Britain, and explains away the sayings of his predecessors as meaning only that Acts of Parliament are to be construed in a reasonable sense if possible. It is worth while to compare the passages.

"It [the law of nature] is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this." [1]

"Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that Acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government." [2]

"True it is that what the Parliament doth, no authority upon earth can undo." [3]

No case is known, in fact, in which an English court of justice has openly taken on itself to overrule or disregard the plain meaning of an Act of Parliament. The example given for illustration's sake is that an Act making a man judge in his own cause would be void. Thus Hold said: —

"If an Act of Parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd." [4]

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[1] Comm. i. 41.
[2] Ibid. i. 91.
[3] Ibid. i. 161.
[4] City of London *v.* Wood, 12 Mod. 687.

But this opinion has never been acted upon; and indeed the example is not wholly fortunate, for the settled rule of law is that although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise. Nowadays the objection of personal interest in the judge commonly presents itself in the form of the judge being a shareholder (for his own behoof or as trustee) in some railway or other public company whose matters are before him; and it is also commonly waived by the parties.[1]

It is now quite well understood that the judges will not discuss the validity of an Act of Parliament. They will not even entertain allegations that a private Act was obtained by fraud or improper practices. If Parliament has been deceived, the remedy is with Parliament alone. Within our own time the late Mr. Justice Willes, a great master of the Common Law, and always ready on fitting occasions to maintain the dignity of the law and its officers, laid this down in the plainest terms. An attempt had been made to found an argument on the suggestion that a local railway company's Acts had been obtained, in effect, by a fraud on Parliament.

"It is further urged," said Willes, J., "that the company is a mere nonentity, and there never were any shares or shareholders. That resolves itself into this, that Parliament was induced by fraudulent recitals to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from Parliament. It was once said — I think in Hobart[2] — that, if an Act of Parliament were to create a man judge in his own case, the court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the court are bound to obey it. The proceedings here are judicial, not autocratic,

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[1] For a reported example see Reedie *v.* L. & N. W. R. Co. (1849), 4 Ex. 244, 20 L. J. Ex. 65, where Parke, B. stated that, being interested in the defendant company, he took part in the case only at the request of counsel on both sides.

[2] In Day *v.* Savadge, Hob. 87: "Even an Act of Parliament made against natural equity, as, to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*."

which they would be if we could make laws instead of administering them."[1]

The sovereignty of Parliament being undisputed, we have to bear in mind exactly what we understand by it for an English lawyer's purposes. No power less than the Queen in Parliament is sovereign, for that is the only power which can issue supreme and uncontrolled legal commands. Parliament as a whole, and Parliament alone, can make and alter the law of the land without reference to any other authority. Moreover, we are not concerned, as students of the sources of English law in general, with the manner in which the action of the supreme legislature is determined. As matter of form, this belongs to the special study of the English constitution and of the law and practice of Parliament. As matter of substance, the consideration of political power, of its practical seat and ultimate sources, would take us out of the field of jurisprudence proper, and into that of politics and constitutional history. It is now generally recognized that the majority of the House of Commons has and exercises, for all substantial intents, political supremacy in these kingdoms. It cannot directly govern at all; it cannot legislate without the concurrence of the House of Lords and the Crown. The Crown, however, can act only on the advice of Ministers, and the Ministers of the Crown are chosen from the party which commands a majority in the House of Commons. That majority, so long as it holds together, can cause its will to be observed, on the whole, in every department of government. Or, to put the same thing in a negative form which is perhaps more accurate, it is not possible for the government of the United Kingdom to be carried on by any lawful means in continuous opposition to the majority of the House of Commons. But this does not touch the doctrine of legal sovereignty. The power which can ultimately determine the bent of legislation, or control the execution of existing laws, but cannot itself legislate, is not a legal but a political power. Now the majority of the House of Commons, as we said, does not govern or legislate. The House of Commons itself has no power whatever of issuing any direct legal commands except so far as it can do so for the purpose of regulating its own procedure and discipline, and enforcing its own privileges. It may practically make a statute inoperative by refus-

[1] Lee *v.* Bude & Torrington Ry. Co. (1871), L. R. 6 C. P. 582.

ing to vote the supplies necessary for putting the statute in execution (a thing which has been known to happen), but it cannot alter one letter of the text. This is not what we understand by sovereignty in the legal sense.

It has been said by one or two modern writers that the electors who return members to the House of Commons are sovereign. This involves a still greater confusion of thought than attributing sovereignty to the House of Commons when elected. The persons chosen by the voters at a general election will certainly form that part of the legislature in which the controlling political power resides. But that, as we have seen, does not make them sovereign, much less does it make the electors sovereign. In fact the electors are not legislators or anything like legislators. They have not the power of issuing any legal commands at all. An identical resolution passed by the electors of every constituency in England, or a large majority of the constituencies, at the time of a general election or at any other time, might be a very notable political event. But it would certainly have no legal force whatever. It would create no kind of legal authority, justification or excuse, and no court of justice would be entitled (much less bound) to pay any attention to it. As Cornewall Lewis long ago rightly said, "The right of voting for the election of one who is to possess a share of the sovereignty is itself no more a share of the sovereignty than the right of publishing a political treatise or a political newspaper."[1]

Although the whole theory of sovereignty is modern, and in fact could not have been definitely held or expressed before the principal states of modern Europe had acquired a strong and consolidated government, writers on the philosophy of law and politics have readily fallen into the way of assuming that civilized government cannot exist, or can exist only in an imperfect manner, unless there is some definite body in the state to which sovereignty can be attributed. Thus Blackstone[2] says: —

"However they [existing forms of government] began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii* or the rights of sovereignty reside."

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[1] Remarks on the Use and Abuse of some Political Terms, London, 1832, p. 43.

[2] Comm. i. 49.

Blackstone's language is well enough suited to the facts that can be observed in the longitude of Oxford or of Paris, and it probably did not occur to him to look much farther. Even in Blackstone's time, however, there might have been some trouble in discovering the *jura summa imperii* in the constitution of the Holy Roman Empire, which was then living in a decrepit old age, but living still. In our own time, if we extend our view eastward to Bern, or as far west as Washington or Ottawa, we may find reason to think that Blackstone laid down the supposed necessity of an absolute uncontrolled authority in terms altogether too peremptory and universal. It would not be appropriate here to enter on the problems, whether legal or political, that are raised by the institutions of federal governments like those of the United States and Switzerland, and in a less complicated degree by those of countries where, as in the Netherlands, or an individual American State within the Union, such as the Commonwealth of Massachusetts or the State of Illinois, the constitution is in fact defined by a fundamental written instrument, and the terms of that instrument cannot be altered by the process of ordinary legislation. In all such cases the ordinary legislative body is in a position much like that of the legislature in a self-governing British colony. We can hardly say that it is in no sense sovereign, for within the bounds of its competence it knows no human superior. But since its competence has assigned and known bonds, we cannot attribute sovereignty to it in the same sense in which sovereignty is attributed to the British Parliament. Where there is a *rigid* constitution, to use the convenient term introduced by Mr. Bryce and Mr. Dicey,[1] there cannot be any one body in permanent existence or habitual activity which possesses unlimited sovereignty. The nearest approach to Parliamentary sovereignty as we have it in England must be sought, in every such case, wherever the ultimate power of altering the written constitution is placed by the constitution itself. In the United States, for example, this amending power is exercisable only with the consent of three fourths of the States expressed either by their legislatures or in special conventions, and moreover no State can be deprived of its equal suffrage in the

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[1] A. V. Dicey, The Law of the Constitution. Mr. Dicey is, I believe, the first writer who has clearly pointed out that the vital difference is not between federal and centralized governments. It is true that a federal constitution must be rigid, or it will not be truly federal. But a non-federal State may equally well have a rigid constitution, though it need not; and many, probably the majority, have.

Senate without its own consent.[1] The English doctrine of absolute sovereignty is not capable of being usefully applied to constitutions of this type. In fact it is a generalization from the "omnipotence" of the British Parliament, an attribute which has been the offspring of our peculiar history, and may quite possibly suffer some considerable change within times not far distant. Such a constitution as that of the United States or of Switzerland may be said to give a definite meaning to the sovereignty of the people, as opposed to the power or caprice of transitory majorities.

Frederick Pollock.

[1] Const. of U. S., Art. V.